UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Operation of the Missouri River System Litigation	)	No. 03-MD-1555 (PAM)
STATE OF MISSOURI, ex rel. Jeremiah W. (Jay) Nixon,	)	
vs.	)	Civil No. 06-CV-1616 (PAM)
UNITED STATES ARMY CORPS OF ENGINEERS, FRANCIS J. HARVEY, SECRETARY OF THE ARMY, UNITED STATES DEPARTMENT OF DEFENSE, and BRIGADIER GENERAL GREGG F. MARTIN,	)	FEDERAL DEFENDANTS' MEMORANDUM IN OPPOSITION TO MISSOURI'S MOTION FOR SUMMARY JUDGMENT
Defendants.	)	

To avoid jeopardy under §7(a)(2) of the Endangered Species Act, 16 U.S.C. 1531 et.seq., to the endangered pallid sturgeon and to comply with the United States Fish and Wildlife Service's (FWS) 2003 Amended Biological Opinion (BiOp), the United States Army Corps of Engineers (Corps) prepared an Environmental Assessment ("EA") under the National Environmental Policy Act, 42 U.S.C. 4321 et.seq., to address the environmental effects of proposed changes to the Missouri River Master Manual which would add to that Manual the technical criteria for implementation of the bimodal spring pulse releases to aid spawning of the pallid sturgeon as called for in the BiOp. As this Court is aware, the Corps had completed in

2004 a broad Environmental Impact Statement (FEIS) on the adoption of the Master Manual.[1/] The purpose of the EA was to determine if the addition of the technical criteria to the Manual would require *the preparation of a Supplemental EIS (SEIS)* under NEPA. The Corps determined that the changes made to the Master Manual would not create any significant environmental impacts beyond those the Corps had previously analyzed in the 2004 FEIS and, therefore, that no supplemental environmental impact statement was necessary.

I. **Summary of Argument**.

In its motion for summary judgment and supporting memorandum, the State of Missouri ("Missouri") characterizes the Corps' EA as a slipshod measure done without study or public participation solely for the purpose of avoiding the NEPA process. Missouri makes little note of the FEIS and instead seems to base its arguments on caselaw relating to proposals where there had been no prior NEPA compliance. The issue in this case, however, is whether a SEIS was necessary and as we will show, no such document was required under the facts of this case. As the Administrative Record filed herein shows, the Corps' EA fully complies with NEPA, and, in fact, the process the Corps followed in developing the EA went well beyond NEPA's requirements. The Corps also provided for extensive public participation — a process in which Missouri was fully involved — and conducted a thorough review of the potential impacts of the proposed additions to the Manual. For these reasons, this Court should determine that the Corps' was reasonable in concluding that no SEIS is necessary, and that conclusion is fully supported by the record and is not arbitrary, capricious, or otherwise not in accordance with the law.

[1/] The legal validity and adequacy of that FEIS was upheld by this Court in its opinion in an earlier case *In Re Operation of the Missouri River System Litigation, 363 F.Supp. 2d, 1145 (2004).*

Missouri's arguments in its memorandum supporting its motion for summary judgment (hereinafter, "Missouri's Memorandum") are without merit for a number of reasons. First, it was appropriate for the Corps to prepare an EA in order to assess whether a SEIS was necessary (and to use a public process that went beyond NEPA's requirements for EA's.) Second, the record supports the Corps' conclusion that a SEIS was not required. In determining that the proposed amendments to the Manual did not present impacts beyond those previously studied, the Corps reasonably relied on the alternatives analyzed in the 2004 FEIS. Further, the Corps reasonably determined through the EA that there was no new information adduced that required the preparation of a SEIS. And, as this Court has previously held, the Corps' use of adaptive management techniques does not violate NEPA because such techniques are not a *per se* violation of NEPA, and the Corps has repeatedly stated that any change in operations resulting from adaptive management will comply with all relevant federal environmental statutes, including NEPA. For these reasons, the Defendants respectfully request that the Court deny Missouri's motion for summary judgment and to grant Defendants' own Motion for Summary Judgment for the reasons stated therein..

II. ARGUMENT

A. The Corps' Preparation of an EA to Analyze the Proposed Changes to the Manual Complies With NEPA.

The Corps properly analyzed the addition of technical criteria for a bimodal spring pulse releases by preparing an EA and Memorandum of Decision. Missouri argues that, in so doing, the Corps has contorted the NEPA process because NEPA provides only for an environmental impact statement ("EIS") accompanied by a Record of Decision or an EA accompanied by a Finding of No Significant Impact ("FONSI"). *Missouri Mem.* at 13–14. Missouri's argument,

however, ignores the relevant well-established case law regarding supplemental environmental impact statements ("SEISs"). Further, as the record herein shows, the process used by the Corps to develop the EA went beyond NEPA's requirements.

The Council on Environmental Quality ("CEQ") regulations implementing NEPA provide that agencies shall issue a SEIS if the agency (1) "makes substantial changes in the proposed action that are relevant to environmental concerns," or (2) if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c). Neither NEPA nor the CEQ regulations, however, address the process by which agencies are to analyze whether changes to a proposed action which has previously undergone NEPA compliance, or whether the presence of new environmental information are substantial enough to warrant a supplemental NEPA analysis. Consequently, agencies have used use a variety of methods to determine whether an SEIS is necessary, and courts have approved the use of documents other than an EA for that purpose. *See Idaho Sporting Cong. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000) and *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989). In *Marsh*, the seminal Supreme Court case on supplemental NEPA work, the Court upheld the Corps' preparation of a supplemental information report ("SIR") in which the Corps concluded that no supplemental EIS was necessary. See also, *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 523 (9th Cir. 1994) (noting that agency prepared a Memorandum of Record concluding that a supplemental EIS is not necessary). These documents are not necessarily circulated for public comment or participation, nor do they necessarily involve a formal Finding of No Significant Impact (FONSI).

In this case, however, the Corps prepared an EA to analyze the changes to the proposed action. *See* EA (SAR 8, Exh. 3088). The EA examined the purpose and need for the bimodal spring pulse releases and compared the environmental impacts of the bimodal spring pulse releases with the range of impacts of alternative spring pulse proposals that the Corps addressed in the 2004 FEIS. *See Mem. of Decision* (SAR 8, Exh. 3088 Enclosure 1). Because NEPA does not require the use of any particular document to analyze changes to proposed actions that have already undergone NEPA compliance the Corps clearly did not violate NEPA by using an EA in this situation.

B. The Corps Properly Concluded That It Did Not Need to Prepare a SEIS.

1. The Corps Employed the Proper Standard in Determining That a SEIS is Not Required.

Missouri next argues that the Corps applied the improper standard to determine that a SEIS is not necessary, and, argues unless the Corps issues a FONSI, it must prepare a supplemental EIS. *Missouri Mem.* at 13. Missouri is wrong. The Corps, however, determined that no SEIS was required because the impacts from the proposed changes to the Master Manual were within the scope of those previously analyzed in the 2004 FEIS. This determination was in full compliance with well-established case law, which requires the agency to prepare an SEIS only when a change to the proposed action or new information "provide a *seriously* different picture of the environmental landscape" than that previously considered. *See Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984).

When determining whether a SEIS is necessary, the test is whether the proposed changes or newly developed information "will 'affect the quality of the human environment' in a significant manner or *to a significant extent not already considered*. If so, a supplemental EIS

must be prepared." *Marsh*, 490 U.S. at 374 (emphasis added). The Eighth Circuit recently reiterated this holding: "To determine whether a change is substantial we look at the possible environmental consequences not previously considered." (Emphasis added). *Arkansas Wildlife Fed'n*, 431 F.3d at 1102 (citing *Marsh*, 490 U.S. at 374). In this case, the Record shows that the Corps properly concluded that the amendments to the Manual did not result in a different environmental picture than that previously considered in the FEIS, and thus no SEIS is required.

2. The Record Supports the Corps' Conclusion that No SEIS is Required Because the Revision's Impacts are Within the Range of Previously Analyzed Alternatives.

Further, the Corps' conclusion that the impacts of the addition of technical criteria to the Manual are within the range of the previously analyzed alternatives is not arbitrary, capricious, or otherwise contrary to law. Missouri argues that because these amendments are not identical to one of the five spring rise alternatives specifically considered in the FEIS and allegedly differs from the considered alternatives in several ways, the Corps is in violation of NEPA. *Missouri Mem.* at 14–17, 18–19. This argument fails, however, because the Corps properly concluded that the expected impacts are within the scope of the FEIS's range of alternatives.[2/]

The criteria for bimodal spring pulse releases now added to the manual has many similarities to the spring rise alternatives presented in the FEIS, and the FEIS alternatives had factors that would result in more spring rises of greater magnitude and duration than the new criteria would produce. For example, the May pulse under the new criteria has a magnitude that could range from 9,000 cfs to 20,000 cfs. EA (SAR 8, Exh. 3088) at 8. The FEIS analyzed

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[2/]Operational alternatives with spring rise elements were described and analyzed in Chapters 4, 5, 6, and 7 of the FEIS. *See* FEIS (SAR 3, Exh. 1943), Vols. 1-2.

ranges from 15,000 to 30,000 cfs. *Id.* at 4. Likewise, the criteria for a spring rise duration is for about 15 days with a 2-day peak, whereas the FEIS alternatives had durations of about 4 weeks: one week for the river to rise to the peak level, two weeks at the peak, and one week to bring the river back down. *Id.* at 4, 8. The criteria's May pulse has timing similar to that of the FEIS alternatives, with the start of the rises beginning in mid-May. *Id.* at 4. Therefore, the fact that they were not chosen is not relevant for the determination of whether an SEIS is needed.

While Missouri argues repeatedly that changes to the Master Manual are "substantial" and "significant," *see, e.g.*, *Missouri Mem.* at 1, 2, 3, 7, 14, it offers nothing from the record to show that the changes are beyond the scope of the previously analyzed alternatives. In fact, the record shows that the pulses under the new criteria will have less impact than the alternatives analyzed in the FEIS. For example, Missouri argues that the changes "substantially reduces the water supply benefits to those who rely on the upstream reservoirs and the river for water due to the reduction in reservoir levels as a result of the spring rise," but the actual difference in water supply, as shown by the EA, will be about 0.1 percent. *See* EA (SAR 8, Exh. 3088) at 22 (Figure 5). The Corps reasonably concluded that such a change was not substantial.

In addition, the Corps built certain safeguards into the criteria to minimize its impacts, and these safeguards are similar to, and less than, those analyzed in the FEIS alternatives. First, the amendments to the Manual include storage level precludes, meaning that unless the reservoirs hold a certain amount of water in storage (36.5 million acre-feet for the first occurrence of either the March or May rise, and 40 million acre-feet thereafter), the Corps will not implement the rise. *See* EA (SAR, Exh. 3088) at 11. In the FEIS, alternatives considered contained precludes to implementation of a spring rise of 31 to 46 million acre-feet. See EA

(SAR 8, Exh 3088) at 5 (Table 1). Second, downstream flow limits for the Revision are at the current flood control constraints, meaning that the spring rises will not cause the flow to exceed the limits already set for flood control purposes.[3/] *See* EA (SAR 8, Exh. 3088) at 5 (Table 1), and Master Manual (SAR 8, Exh. 3088), ¶1-03.2.5 on p.1-8. The FEIS alternatives examined a range of flow limits, from the current levels based on current flood control constraints, to increases in these limits equivalent to the peak magnitude of the spring rise. *See* EA (SAR 8, Exh. 3088) at 5 (Table 1). Missouri also makes much out of the fact that the FEIS alternatives contained only a May rise, whereas the Revision has provisions for a March and a May rise. However, the March rise is well within the normal operation range of the Gavins Point project and is similar to an operation that has been in the Master Manual since 1960. *See* EA (SAR 8, Exh. 3088) at pp. 12-14 and 33. The current Master Manual states that, in order to avoid groundings that can occur at the beginning of the navigation season, "when appropriate, based on water supply, downstream flow support releases at the beginning of the season may be scheduled for a short period at a level of up to 5,000 cfs higher than the service level requires, to provide channel conditions provided System storage levels at the time are adequate." See 2004 Master Manual (SAR 4, Exh. 1980 at ¶7-13.1.1 on p. VI-51. The 1979 Master Manual contains similar wording. See 1979 Master Manual (AR Exh.1), ¶ 9-20 p. IX-9.

In other cases courts have held that changes to projects that are within the scope of

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[3/]In footnote 8, Missouri expresses its concern that the Corps' plan increases releases when the Corps forecasts higher runoff. *See Missouri Mem.* at 6 n.8. Again, however, the magnitude of the spring pulse is constrained by the downstream flow limits. In the current Master Manual, those limits are equal to the more restrictive flood control constraints. Thus, the amount released from Gavins Point Dam will be limited by the downstream flow limits even if the releases are related to the runoff into the System upstream from Gavins Point Dam. Master Manual (SAR 8, Exh. 3088), ¶1-03.2.5 on p. I-8.

previous NEPA analysis are not "substantial" so as to warrant a SEIS. For example, in *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209 (11th Cir. 2002), the Corps prepared an EIS analyzing the highway, and later changed the alignment and shortened the length of the highway. *Id.* at 1217. The court held that because "the new route was entirely within the study area of the 1994 EIS," the EIS evaluated any environmental impacts from the changed route. *Id.* at 1221. The Corps, therefore, was not required to prepare a new EIS. *Id.* Likewise, in *Arkansas Wildlife Federation*, the Corps prepared an EIS evaluating a project to withdraw water from the White River for irrigation purposes and deliver it to farms through a series of canals and streams. *Arkansas Wildlife Fed'n*, 431 F.3d at 1103. Later, the Corps prepared an EA to analyze changes to the project, including using pipelines to deliver water instead of canals and streams, widening a canal, and changing the alignment of some canals and pipelines. *Id.* at 1099. The Eighth Circuit upheld the Corps' decision that a SEIS was not necessary because "[t]he Corps adequately considered the environmental impact of the proposed changes and reasonably concluded that they were not significant and that any environmental impact appears to be positive rather than negative." *Id.* at 1103. Consequently, the court deferred to the Corps' substantial agency expertise that no SEIS was necessary. *Id.*

Missouri also argues that the Corps improperly compares the technical criteria amendments to the Manual to the 1979 Master Manual instead of the 2004 Master Manual. *See Missouri Mem.* at 8. The EA analyzes the effects of the spring pulse releases as compared to the previous water control plan (PWCP), which was the operational plan in the 1979 Master Manual. *See, e.g.*, EA (SAR 8, Exh. 3088) at 14 (Figure 3). The FEIS also analyzed its alternatives as against the previous water control plan in the 1979 Master Manual. Accordingly, the two

documents have the same baseline for comparison, which allows readers to compare the relative difference from the FEIS to the EA figures. In any event, however, the Corps was straightforward about the data being compared. While the figures in the EA use the previous water control plan from the 1979 Master Manual as the baseline, they also plot the 2004 Master Manual's current water control plan. *See, e.g.*, EA (SAR 8, Exh. 3088) at 14 (Figure 3). Thus, readers can easily see comparisons between the EA and the FEIS alternatives. The EA is straightforward about the data being compared, and, therefore, there is no NEPA violation.

In sum, although the amended spring pulse plan is not an exact alternative that was previously analyzed, the scope of the impacts from that plan are within the range of impacts that the Corps previously analyzed. This Court addressed and rejected a similar argument by Missouri in its 2004 opinion in *In re: Operation of the Missouri River System Litigation*, 363 F. Supp. 2d 1145, 1165 (D. Minn. 2004). In the FEIS, the Corps evaluated flows at 21,000 cfs and 28,500 cfs, but chose to implement a plan with a flow of 25,000 cfs, which was not specifically evaluated. *Id.* This Court held that the implemented plan was within the range of alternatives examined. *Id.* "The 'rule of reason' requires the Court to determine whether the Corps has complied with the Final EIS in good faith, and whether the Final EIS 'sets forth sufficient information to allow the decision-maker to consider alternatives and make a reasoned decision after balancing the risks of harm to the environment against the benefits of the proposed action.'" *Id.* (quoting *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999)). As the *Friends of the Boundary Waters Wilderness* court noted, "[t]he role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its decisions and that its decision is not arbitrary and capricious." *Friends of the*

Boundary Waters Wilderness, 164 F.3d at 1128. Here, while the Corps did not address the precise alternative in the FEIS that it now plans to implement, given that the impacts of the proposed changes fall squarely in between the range of flows rates the FEIS exhaustively addressed, and since these changes are expected to have less impact than the previously analyzed, there can be no doubt that the Corps acted reasonably in reaching its decision not to prepare a SEIS.

3. The Record Supports the Corps' Conclusion that No New Information Mandates Preparation of a SEIS.

Missouri next argues that a SEIS is required because, in its view, the EA (1) contains factual errors, (2) does not consider changes in applicable conditions since the FEIS, and (3) fails to address substantial new issues presented solely by the adoption of the criteria. *See Missouri Mem.* at 8, 19–20. However, the Corps' conclusion that no SEIS was required is fully supported by the record and is consistent with NEPA and the case law interpreting NEPA. Missouri has not shown that there is any valid reason or new information that mandates the preparation of a SEIS.

First, Missouri's argument that a SEIS is required because the EA allegedly contains factual errors is misplaced. *See Missouri Mem.* at 17–19. While the EA does contain an inadvertent error in Table 5, causing the PA value for water supply to read 607.7 instead of the correct figure of 610.7, this error does not indicate that the Corps must prepare a SEIS. See Declaration of Roy F. McAllister at paragraphs 5-6. [Attached at Exhibit A]. This is particularly true because, as Missouri notes, the text elsewhere in the EA properly describes the water supply benefits for the Revision as being within the range of the previously considered alternatives. *See* EA (SAR 8, Exh. 3088) at 15.

Missouri also argues that the Corps erred by finding that the impacts of the proposed changes were within the scope of those previously analyzed when, in fact, the navigation benefits for the Preferred Alternative are higher than the FEIS's alternatives and water supply benefits are lower. As previously noted, the water supply value represented in the EA's Table 5 contains a inadvertent error for the preferred alternative, but the water supply section in the text (4.3.4) properly notes that the preferred alternative "provides water supply benefits that fall within the range of the FEIS spring pulse alternatives." *See* EA (SAR 8, Exh. 3088) at 15. Missouri's argument about the navigation benefits being outside the range of those previously studied also fails, however, because while navigation benefits are higher than the FEIS's range of spring rise alternatives, they represent less than a 0.3 percent change from the current water control plan which was also one of the alternatives considered in the FEIS. *See id.* at 17 (Figure 7), 22 (Table 5). Furthermore, the Corps responded to a comment regarding impacts to navigation in the EA. *See id.* at 29. The Corps noted that in many years, the additional water released for the spring pulse would not impact the navigation season length at all, and the "potential for a minimal change in season length should have a minimal effect on navigation on both the Missouri and Mississippi Rivers." *Id.* The Corps properly concluded that this small, positive increase in navigation benefits did not present a seriously different environmental picture, necessitating a SEIS.

In *Arkansas Wildlife Federation*, the court addressed a similar situation, where the Corps concluded that proposed changes would not have a significant environmental impact and the minimal impact would be positive rather than negative. The Court stated, "[a]lthough we do not hold that a reduction in the environmental impact can never trigger the requirement to prepare a

SEIS, 'a reduction in the environmental impact is less likely to be considered a substantial change relevant to environmental concerns than would be an increase in the environmental impact.'" *Arkansas Wildlife Fed'n*, 431 F.3d at 1103 (quoting *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218–19 (10th Cir. 1997)). Likewise, here, any minimal change from the current water control plan is likely to be positive and would not be considered a substantial change relevant to environmental concerns. *See id.*

Missouri further argues that there is no evidence in the EA that the planned spring rise will benefit the pallid sturgeon. *Missouri Mem.* at 19. To the extent that Missouri is arguing against any spring rise at all or that the Corps' EA does not indicate that the selected alternative will benefit the pallid sturgeon, that argument is barred by the doctrine of *res judicata* and this Court's 2004 opinion in the Master Manual case. This Court previously found that the 2003 Amended BiOp requires a spring rise, and that the FWS's 2003 Amended BiOp was not arbitrary and capricious. *In re: Operation of Missouri River System Litigation*, 363 F. Supp. 2d at 1159–60. Missouri as a party to that case is bound by the decision and cannot reassert it at this time.

In any event, the Corps reasonably relied on FWS's expertise in determining that the spring pulse would benefit the pallid sturgeon. The 2003 Amended BiOp's Reasonable and Prudent Alternative to avoid jeopardy to the pallid sturgeon called for the Corps to develop a plan to implement a bimodal "spring pulse" release from Gavins Point Dam. *See* 2003 Am. BiOp (SAR 3, Exh. 1914) at 226–54. The FWS determined that the spring pulse was necessary to provide for spawning cues and flood plain connectivity for the pallid sturgeon in the late spring and early summer. *Id.* at 224–26. The FWS stated that the Corps' flow plan should be

designed to be responsive to the hydrologic conditions in the basin based on system storage, winter precipitation, and the future projected precipitation based on probabilities from historic records. *Id.* at 234.

Under § 7(a)(2) of the ESA, all federal agencies are required to consult with the appropriate Secretary (in this case the FWS acting for the Secretary of the Interior) in order to insure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species. . ."

The FWS is the agency with expertise relating to the endangered pallid sturgeon, and the Corps acted reasonably in relying on the FWS's expert opinion that a bimodal spring rise would benefit the pallid sturgeon. *See Laguna Greenbelt*, 42 F.3d at 523 (holding that by consulting with FWS and the Corps, the Federal Highway Administration "relied on substantial technical expertise possessed by two federal agencies charged with responsibility for the respective sectors of the affected environment").

While it is legally possible that the Corps could have disagreed with the FWS BiOp, it would do so at a great risk of violating the Endangered Species Act. *See Bennett v. Spear*, 520 US 154, 170 (1997) where Justice Scalia (at page 170) said:

> The action agency is technically free to disregard the Biological Opinion and proceed with the proposed action, but it does so at is own peril (and that of its employees), for "any person" who knowingly "takes" an endangered or threatened species is subject to substantial civil and criminal penalties....

NEPA does not require the Corps to revisit the basis for the FWS BiOp, and in this case the Corps acted properly and legally in relying on FWS's opinion that the bimodal spring pulse release would benefit the sturgeon and avoid jeopardy to that species.

Missouri also argues that the Corps is required to do a SEIS because the Department of

Agriculture (USDA) allegedly stated that any losses caused by flooding resulting from the spring rise will not be covered by federal crop insurance. *Missouri Mem.* at 19. Missouri offers no support for the proposition that any change in crop insurance coverage would be new information "relevant to environmental concerns and bearing on the proposed action or its impacts." *See* 40 C.F.R. § 1502.9 (c). The environmental impacts of the proposed action remain the same, whether or not flooding losses are covered by federal crop insurance. This is not, therefore, new information requiring a SEIS.

More importantly, however, Missouri's assertions are in error. While USDA initially indicated, in correspondence dated February 1, 2006 to the Missouri Corn Growers Association, that crop losses caused by the spring pulse releases would not be covered by crop insurance, *see* SAR 8, Exh. 3062-encl 1, it later requested information from the Corps regarding the spring pulse, *see* SAR 8, Exh. 3062-encl 2. The Assistant Secretary of the Army for Civil Work responded to USDA's letter on February 14, 2006, and provided the requested information indicating that the spring pulse releases would not, in themselves, cause crop losses. *See* SAR 8, Exh. 3062-encl 3. The USDA then clarified its previous position and notified Congressional offices that flooding due to the spring rise pulses, in the absence of some natural high runoff event, was not anticipated. *See* SAR 8, Exh. 3062-encl 4. The letter further indicated that if a natural event occurred during implementation of the spring rise, and that event caused flooding, this would be covered under the crop insurance program similar to a natural event occurring while the Corps was providing flows for navigation. *See id*. Subsequently, both the Corps and the USDA testified before congressional committees to that effect. The Corps' testimony is in the record. SAR 8, Exh. 3083 and Exh. 3085-encl 2. Therefore, given USDA's clarification of

its position before the Corps issued its Memorandum of Decision, the Corps properly concluded that this was not new information requiring a SEIS.

Finally, Missouri argues that the Corps should have prepared a SEIS because the underlying data — namely, the United States Bureau of Reclamation's estimates regarding depletion of the Missouri River due to consumption — changed between the FEIS and the EA. *See Missouri's Mem.* at 19–20. The Corps used raw data provided by the United States Bureau of Reclamation in the Corps' hydrologic model for the NEPA analysis. In this case, the Corps has consistently used the Bureau of Reclamation's raw data provided in 1987. See AR Exh. 928, Vol.2A at 9, Reservoir Regulation Studies, Daily Routing Model Studies. Missouri bases its argument on Corps' analysis being conducted for the Bureau of Reclamation to evaluate the impacts of diverting water from the Missouri River to the Red River Valley. *See Missouri Mem. Exh. 5.* The Red River Valley analysis uses a different data set provided by the Bureau of Reclamation in 2005, based on 2002 basin data, than the data set the Corps has consistently used in its evaluation. In this case, the Corps examined the alternatives in both the FEIS and the EA against the same data set. Missouri does not argue that the amount of depletions changed between the FEIS and the EA, just that the Bureau of Reclamation's estimate of that number changed. However, because the Corps ran the models for all the alternatives against the same data set, the relevant factor for the Corps is not the amount of depletions, but the relative variations among the various alternatives. Thus, even if the Bureau of Reclamation's estimate of the depletion has changed, it is irrelevant to the Corps' analysis. Therefore, the Corps acted reasonably in not preparing a SEIS based on this factor.

4. The Corps Complied With NEPA's Public Participation Requirements.

Missouri also has not shown that that by preparing an EA, the Corps denied Missouri and other interested parties a full and fair opportunity to comment on the proposed analysis. *Missouri Mem.* at 12. NEPA, however, as we have previously stated does not require public participation in the decision of whether to prepare a SEIS. The record shows, however, that Missouri cannot realistically claim that the Corps' use of an EA to analyze the changes to the Master Manual denied the public an opportunity to participate in the NEPA process because the Corps involved the stakeholders, including Missouri itself, extensively in the process. *See Missouri Mem.* at 12.

"Although NEPA requires agencies to allow the public to participate in the preparation of an SEIS, there is no such requirement for the decision whether to prepare an SEIS." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) (citing *California v. Watt*, 683 F.2d 1253, 1268 (9th Cir. 1982), *rev'd on other grounds sub nom.*, 464 U.S. 312 (1984)). Requiring extensive public participation every time new information comes to light "would render agency decision making intractable." *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 544 (8th Cir. 2003); *see also Friends of the Clearwater*, 222 F.3d at 560. As the Ninth Circuit explained, "[w]ere we to hold otherwise, the threshold decision not to supplement an EIS would become as burdensome as preparing the supplemental EIS itself, and the continuing duty to gather and evaluate new information . . . could prolong NEPA review beyond reasonable limits." *Friends of the Clearwater*, 222 F.3d at 560.

More importantly, however, Missouri's argument must also be dismissed because it is factually wrong. As discussed more thoroughly in the Federal Defendants' memorandum supporting its motion for summary judgment, the Corps involved the stakeholders and the public

extensively in the process of evaluating the spring pulse plan. *See Fed. Defs.' Mem.* at 8–10. The Corps brought in the United States Institute for Environmental Conflict Resolution's ("USIECR") help in bringing together the Missouri River Basin's State and Tribal representatives, as well as a wide range of other basin stakeholders, to try to develop a consensus on the spring rise. The Plenary Group, comprised of more than 50 members, including Tribal representatives and members, State representatives (including the State of Missouri), and non-governmental stakeholders met several times, as did technical working groups, to consider a number of issues related to the spring pulse technical criteria. The USIECR also created a website accessible to the public for materials related to this collaborative process. When the Plenary Group was ultimately unable to reach a consensus on the spring pulse plan, the Corps still utilized the input from the Group to develop the draft Annual Operating Plan ("AOP") for 2006 and formulate the draft technical water control criteria for the spring rise. The Corps released the Draft 2005-2006 AOP and the Draft Spring Pulse Water Control Plan Technical Criteria for spring pulses from Gavins Point Dam for Tribal, state and public review and comment. SAR 8, Exh. 2963. The Corps conducted three public meetings — which State of Missouri official and citizens participated in through oral and written comments — throughout the Missouri River basin during the week of November 13, 2005, and received written comments on the draft documents, including comments from the Governor and the Attorney General of the State of Missouri. SAR 8, Exh. 3030 at Enclosure 32; Exh. No. 3030 at Enclosure 33. The Corps provided formal responses to the Governor's comments. In addition, the Corps summarizes and provided responses to all substantive comments in the EA. SAR 8, Exh. 3088 at 28–30.

The public and Missouri, therefore, had more than an ample opportunity to participate in the process. The Record also reflects that Missouri took advantage of these opportunities. Missouri may now disagree with the Corps' ultimate conclusions, but there is no support for its argument that it did not have a full and fair opportunity to make its viewpoints known. As has been often stated, NEPA provides a public process, but does not mandate substantive results. The Corps has fully fulfilled its NEPA duties in this case.

5. This Court Should Defer to the Corps' Judgment that a SEIS is Not Required.

Further, since the Corps has expertise in determining whether a SEIS is required, this Court should defer to the Corps' judgment unless it is arbitrary, capricious, or otherwise not in accordance with the law. *See Marsh*, 490 U.S. at 375 (noting that decision as to whether SEIS is required "is a classic example of a factual dispute the resolution of which implicates substantial agency expertise"). As the Eighth Circuit stated in the *Arkansas Wildlife Federation* case:

> This Project has proceeded through various stages over a period of years with much involvement of interested parties. As has been pointed out, "the NEPA process involves an almost endless series of judgment calls[,] . . . [t]he line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts," *Coalition on Sensible Transportation, Inc. v. Dole*, 826 F.2d 60, 66 (D.C.Cir. 1987).

Arkansas Wildlife Fed'n, 431 F.3d at 1104 (alteration in original).

C. The Corps' Use of Adaptive Management Techniques Does Not Violate NEPA.

Missouri makes a general argument that the current Master Manual "attempts to incorporate adaptive management techniques in the management of the Missouri River without congressional authorization or necessary procedural safeguards, and is therefore, not in accordance with the law." *Missouri Mem.* at 20. Missouri cites no statute or case law

supporting its position that the Corps' use of adaptive management techniques is in violation of the law. Instead, Missouri solely relies on comparisons to the Corps' Comprehensive Everglades Restoration Plan, without any support for its theory that the two programs must be treated the same. *See id.* The Corps has repeatedly stated that any change in operations resulting from adaptive management must comply with all relevant federal environmental statutes, including NEPA. Accordingly, Missouri's claim that the Corps' use of adaptive management violates the law is without merit and also should be barred by the doctrine of *res judicata.*

As this Court has previously recognized in the Master Manual review case, the Corps' FEIS and 2004 Master Manual describe adaptive management:

> Adaptive management is an approach to natural resources management, in which policy choices are made incrementally. As each choice is made, data on the effects of these choices are collected and analyzed in order to assess whether to retain, reverse, or otherwise alter the policy choice.

363 F. Supp. 2d at 1163; see also Corps AR, Exh. 1332, RDEIS Summary at 8. Thus, adaptive management does contemplate that there will be changes in the Corps' management of the Missouri River, but also provides that those changes may be subject to NEPA and other federal requirements, if appropriate. The National Academy of Sciences and the FWS also endorsed the Corps' adaptive management. FWS AR 1071, 89. FWS AR 1237, 2000 Biological Opinion at 3.

This Court held in that opinion "[a]bsent evidence that the adaptive management process actually results in the Corps' evasion of NEPA obligations, the Court declines to declare this approach invalid." 363 F. Supp. 2d at 1164. Once again, Missouri has failed to show that the Corps' adaptive management process has resulted in any NEPA violation. As described elsewhere in this document, the Corps has fully complied with NEPA in evaluating the Revision

to the Master Manual. Should the Corps make changes in the future to its operation of the Missouri River, those changes will be subject to all appropriate environmental requirements, including NEPA. Corps AR 1943, FEIS at D1-69. This statement has been reiterated in the ROD (Corps AR 1970, ROD at 3) and the Final Biological Assessment (Corps AR 1943, C-4). Accordingly, Missouri's argument that the Corps' use of adaptive management techniques is somehow contrary to law must be rejected.

CONCLUSION

For the foregoing reasons, the Corps respectfully requests that this Court deny Missouri's motion for summary judgment and grant its own Motion for Summary Judgment..

Respectfully submitted this 24th day of August, 2006.

SUE ELLEN WOOLDRIDGE
Assistant Attorney General
U.S. Department of Justice
Environment & Natural Resources Division

/s/ Fred R. Disheroon
FRED R. DISHEROON
Special Litigation Counsel
Washington DC 20044-0663
(202) 616-9649 (tel.)
(202) 616-9667 (fax)
Fred.Disheroon@usdoj.gov

DEVON LEHMAN McCUNE
Trial Attorney (CO Bar No. 33223)
Natural Resources Section
P.O. Box 0663
Washington DC 20044-0663
(202) 305-0434 (tel.)
(202) 305-0506 (fax)
Devon.McCune@usdoj.gov

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Operation of the Missouri River System Litigation	)	No. 03-MD-1555 (PAM)
STATE OF MISSOURI, ex rel. Jeremiah W. (Jay) Nixon,	)	
vs.	)	Civil No. 06-CV-1616 (PAM)
UNITED STATES ARMY CORPS OF ENGINEERS, FRANCIS J. HARVEY, SECRETARY OF THE ARMY, UNITED STATES DEPARTMENT OF DEFENSE, and BRIGADIER GENERAL GREGG F. MARTIN,	)	LR 7.(c) WORD COUNT COMPLIANCE CERTIFICATE REGARDING FEDERAL DEFENDANTS' MEMORANDUM IN OPPOSITION TO MISSOURI'S MOTION FOR SUMMARY JUDGMENT
Defendants.	)	

I, Fred R. Disheroon, certify that the Federal Defendants' Memorandum in Opposition to Missouri's Motion for Summary Judgment complies with Local Rule 7.1©.

I further certify that, in preparation of this memorandum, I used WordPerfect Version 12, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains 6725 words.

Date: August 24, 2006

s/ *Fred R. Disheroon*
FRED R. DISHEROON

Special Litigation Counsel
Washington DC 20044-0663
(202) 616-9649 (tel.)
(202) 616-9667 (fax)
Fred.Disheroon@usdoj.gov
ATTORNEY FOR FEDERAL DEFENDANTS.

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2006, I caused the Federal Defendants' Memorandum in Support of Motion for Summary Judgment to be filed electronically with the Clerk of Court through ECF, and that ECF will send an e-notice of the electronic filing to the following:

Joseph P Bindbeutel
joe.bindbeutel@ago.mo.gov

Donald G Blankenau
dblankenau@blackwellsanders.com smarburger@blackwellsanders.com

Jaron J Bromm
jbromm@blackwellsanders.com smarburger@blackwellsanders.com

William J Bryan
bill.bryan@ago.mo.gov

David D Cookson
david.cookson@ago.ne.gov liz.eberle@ago.ne.gov

Fred R Disheroon
fred.disheroon@usdoj.gov

H Todd Iveson
todd.iveson@ago.mo.gov

James A Maysonett
James.A.Maysonett@usdoj.gov

Devon L McCune
devon.mccune@usdoj.gov angelica.ramos@usdoj.gov;efile_nrs.enrd@usdoj.gov

Thomas R Wilmoth
twilmoth@blackwellsanders.com

No parties require manual noticing.

Dated: August 24, 2006

s/ Fred R. Disheroon
FRED R. DISHEROON